



Our ref: 20/10

31 March 2020

The Hon Kevin Andrews MP
Chair
Joint Select Committee on Australia's Family Law System
PO BOX 6100
Parliament House
CANBERRA ACT 2600

By email

Dear Chair

Answers to Questions on Notice and supplementary submission to the Joint Select Committee on Australia's Family Law System

1. Thank you again for the opportunity for the New South Wales Bar Association (**the Association**) to appear before the Joint Select Committee on Australia's Family Law System (**the Committee**) on Friday, 13 March 2020.
2. The Association remains of the view that this inquiry has an important role to play in promoting resourcing and reform of the family law system. It also has the potential to lead meaningful consideration and responses to recent reports, including the ALRC's 2019 landmark review of the family law system and the House of Representatives 2017 Inquiry led by Senator Henderson, and to inform public debate on the issues of evidence, enforcement of orders and costs. If the Committee or its members would like any further information or an additional briefing at any time, the Association would be pleased to assist.
3. During the Association's appearance, the Chair of the Association's Family Law Committee, Michael Kearney SC, and the Association's Director of Policy and Public Affairs, Elizabeth Pearson, referred to several sources and undertook to provide these details to the Committee for information. These are outlined in turn below, with reference to the Hansard Proof available as at 19 March 2020.
4. The Association has also received two written questions on notice from Senator Waters. Answers to these questions are incorporated below.

The need for additional judicial resources

5. On page 33 of the hearing Hansard, the Association referred to a statement by the Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court in support of the need for additional judicial officers and undertook to provide the source. This was a reference to the Chief Justice's comments reported in *Proctor* magazine in November 2019 that "we definitely need more judges" in both courts, and that "if we had an extra judge in every major registry it would make a massive difference".¹

¹ Quoted in Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 32.

The nexus between a reduction in court events and cost to the parties

6. On page 34 of the hearing Hansard, the Association referred to evidence by the Attorney-General's Department that a reduction in the series of court events will reduce the cost to the parties. By way of example, Attorney-General's Department Deputy Secretary, Legal Services and Families Group, Professor Anderson, provided the following evidence to the Canberra hearing of the inquiry on 14 February 2020:²

Senator CHANDLER: What I'm saying is, if people are getting a bill of—the number you've used here is—\$110,000 on a matter, if we reduce the backlog and people are able to go through the process in a more timely fashion, what impact will that have on the bill that people are receiving at the end?

Prof. Anderson: Our expectation is that people would be billed less by legal professionals, because there would be less court events that they would be billed by legal professionals to attend and to participate in.

7. Similarly, Families and Legal System Division First Assistant Secretary, Mr Gifford, told Senate Estimates on 3 March 2020 that:³

As I've referenced, in terms of the single case management system, and part of that also goes to the way that the courts would utilise their resources. For instance, that would be greater use of judicial registrars rather than judges. They would reduce the number of court events, so as to be able to deal with the matters much more efficiently. That would give the judges the ability then to also hear additional matters, so as to address what is the current backlog within the family courts.

Pro bono work undertaken by the New South Wales Bar

8. Barristers in NSW support pro bono schemes operating in the Federal Court, the Full Bench of the Family Court and the Federal Circuit Court, in addition to Court appointed pro bono schemes and Duty Barristers Schemes in the New South Wales State Courts. Barristers also undertake pro bono work in their private practice.
9. There are very few jobs where people routinely turn up and work for free. Yet, despite the pressures of operating as sole traders and not receiving the same entitlements as employees, pro bono work is a proud tradition of the New South Wales Bar, reflected in the widespread practice of members of all levels of seniority.
10. The Legal Assistance Referral Scheme, run by the Association, is another small but important example of this work and of the Bar's commitment to public service. It is important to note that the Scheme represents but one part of the commitment of the Association to pro bono assistance, such assistance being provided outside of and in addition to the Scheme through various court-annexed services, the Association's Duty Barrister Scheme, NSW Legal Aid, on direct request by courts and in response to requests by solicitors and litigants.
11. The Legal Assistance Referral Scheme has operated at the coalface of offering services to people requiring legal help for 25 years, during which it processed more than 6000 applications. The Scheme embodies and reflects the strongly held view of our profession that a person's rights and access to justice should not be diminished because of impecuniosity. During 2017-18, local barristers completed more than 4000 hours of work under the Scheme.⁴ In 2018-19

² Evidence to the Joint Select Committee on Australia's Family Law System, Canberra, 14 February 2020, 7.

³ Evidence to Senate Estimates, Canberra, 3 March 2020, 53.

⁴ New South Wales Bar Association, *Annual Report 2017-18* (2018) 39.

financial year, barristers contributed approximately 1350 hours of work through the Scheme,⁵ with 34 matters remaining in the courts system in 2019-20 and work on these matters continuing.

12. Further to the Association's oral evidence to the Committee, barristers are self-employed practitioners, which means that they do not receive the same entitlements as employees, such as sick leave, long service leave or holiday pay. Barristers do not get paid unless they work, and there is no guarantee of where or when work will be received. In addition, barristers employ staff such as personal assistants or researchers, and must attend to their own accounting, taxation and administrative issues in addition to running their practice. Despite this, the Bar remains committed to pro bono work.

Answer to Question 1 on Notice

13. Senator Waters asked the Association in writing to take the following Question on Notice:

Your submission notes that the introduction of s.102NA of the Family Law Act 1975 has improved family violence matters by ensuring lawyers can interrogate and test evidence in cases involving allegations of violence. These provisions also protect victims from being interrogated by their alleged abusers.

But you also say that this scheme suffers from a lack of resourcing. What are the consequences of that?

14. The Family Violence and Cross-examination of Parties Scheme (**the Scheme**) is a discrete program that operates separately from Legal Aid's ordinary grants process. The recent commencement of the Scheme without sufficient funding illustrates the adverse impacts that occur for victims of family violence, legal assistance providers and the Courts when adequate resourcing is not provided to the family law system.
15. Cross-examination serves an important role in testing evidence presented to the courts. Funding the Scheme is crucial to ensure alleged victims and alleged perpetrators alike can access legal assistance, otherwise they would be denied the opportunity to cross-examine a witness, or have their matter delayed and lives put on hold until legal aid funding can be made available from the Government. Regrettably, as outlined below, that has already been the experience of families involved in more than 35 trials in Brisbane alone.
16. The Scheme also clearly illustrates the importance of ensuring the financial implications of proposed reforms to the justice system are properly evaluated and sufficient funding budgeted for before, not after, a bill is introduced to the Parliament or enacted.
17. The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth) (**the Cross-Examination Bill**) was introduced to the Parliament in June 2018 without any funding commitment and before negotiations had been concluded with National Legal Aid.
18. The Cross-Examination Bill introduced a new section 102NA to the Family Law Act 1975 (Cth), intended to provide mandatory protections for victims of family violence by prohibiting direct cross-examination in certain cases.⁶ Under the amendment, if relevant circumstances of family violence apply, a party intending to personally cross-examine the other party may be restrained by Order from doing so. If such an Order is made, the cross-examination must be

⁵ New South Wales Bar Association, *Annual Report 2018-19* (2019) 49.

⁶ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Report, August 2018) [2.5].

conducted by a legal practitioner acting on behalf of the examining party (regardless of whether the examination is being conducted by the alleged perpetrator or the alleged victim).

19. Stakeholders including the Association, National Legal Aid and the Law Council of Australia, raised significant concerns at the time that the Scheme would not be able to achieve its intended purpose and would adversely impact upon access to justice unless properly resourced and funded.
20. National Legal Aid made it clear that the Scheme was not able to be funded from the existing legal aid resources. The Scheme's successful operation therefore required the provision of additional funding for legal aid and legal assistance providers, as well as the family law system and courts more broadly.
21. In August 2018 the Legal and Constitutional Affairs Legislation Committee inquiring into the Cross-Examination Bill recommended the Bill's passage be subject to details regarding the funding of the measures contained in the Bill being made public prior to the commencement of debate in the Senate.⁷
22. In November 2018 the Government announced that \$7 million would be provided over three years to legal aid commissions to administer the Scheme and provide legal representation to parties subject to the ban.⁸
23. The Cross-Examination Bill was passed in December 2018 and the new section 102NA and the Scheme commenced from 10 September 2019.⁹
24. Just three months after commencement, the Government has had to make an urgent \$2 million funding injection, through the Mid-Year Economic and Fiscal Outlook, to prop up the Scheme during 2019-20 alone, after National Legal Aid advised the courts that the funding for this year had already been exhausted.
25. Another \$1.2 million funding injection was urgently required in February, after Forrest J noted in judgment that in Brisbane registries alone, more than 5 listed trials in the Family Court and more than 30 listed trials in the Federal Circuit Court had been directly impacted by notice from Legal Aid Queensland that funding under the scheme was not available.¹⁰ His Honour wrote that "Unfortunately, in my considered judgment, that leaves the Court with no option other than to vacate the forthcoming trial dates ... I sincerely regret having to do this".¹¹
26. Department officials told Senate Estimates in March 2020 that the original appropriated budgeted for the Scheme was based on an expectation of receiving just 192 applications this year.¹² As at 31 January 2020, 431 applications had already been received since the Scheme commenced – more than double the modelled number.¹³

⁷ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Report, August 2018) vii.

⁸ Attorney-General's Department, *Women's Economic Security Package: Family Violence and Cross-examination of Parties Scheme* (November 2018); see also Attorney-General's Department, *Supporting women to recover financially after separation* (2018).

⁹ Attorney-General's Department, *Family Violence allegations in family law proceedings info sheet* <<https://www.ag.gov.au/FamiliesAndMarriage/Families/Documents/Family-violence-allegations-in-family-law-proceedings-info-sheet.pdf>>.

¹⁰ See Vanessa Marsh, 'DV victims failed by Federal Court funding shortfall', *The Courier Mail* (online), 28 February 2020 <<https://www.couriermail.com.au/truecrimeaustralia/police-courts/dv-victims-failed-by-federal-court-funding-shortfall/news-story/8bc80c1089dc792910c02e7312f4851a>>; see also Law Council of Australia, 'Legal funding welcome but underscores crisis' (Media Release, 28 February 2020) <<https://www.lawcouncil.asn.au/media/media-releases/legal-funding-welcome-but-underscores-crisis>>

¹¹ *Ibid.*

¹² Evidence to Senate Estimates, Canberra, 3 March 2020, 57 (Ms Alex Mathews, Assistant Secretary, Family Safety Branch, Families and Legal System Division).

¹³ *Ibid.*

27. This \$3.1 million is insufficient to meet outstanding need or set the Scheme up for success. The represents two one-off investments in the current financial year 2019-20 only. No further funding has been committed over the forward estimates to support the Scheme.
28. This serious underfunding of the Scheme must be addressed as an urgent priority. Importantly, lessons must be heeded from this experience.
29. The Cross-Examination Bill demonstrates the importance of accurately budgeting for and allocating adequate resources to support legislative change to the justice system, including to legal assistance and the family law system. It is critical that these funding and resourcing considerations are worked through and determined before, not after, a bill is introduced to Parliament, to ensure it can actually be effectively implemented.
30. Understanding the link between resourcing and the justice system is crucial to promote the administration of and access to justice.
31. Budgeting on the run, and after the fact, is not only fiscally irresponsible, it has direct, adverse impacts on the lives of those engaging and working within the justice system. Mistakes made in respect of financial provision to support the Cross-Examination Bill must not be repeated.
32. We refer to the Government's merger proposal, which is currently before the Parliament in reintroduced form as the Federal Circuit and Family Court of Australia Bill 2019 (Cth) and accompanying transitional amendments bill (**the Amended Merger Bills**). The Attorney-General stated in his Second Reading Speech on the Amended Merger Bills in December 2019 that:¹⁴

The government, as part of this reform, has also committed to providing:
an extra \$4 million in funding to the federal courts to review court rules and assist with implementation of the reforms; and

an extra \$3.7 million over the forward estimates for an additional FCFC Judge.

However, while the government is committed to ensuring that the courts are appropriately resourced, it is not a good use of taxpayer funds to simply appoint additional Judges without first addressing the fundamental structural problems that have existed within the courts.

33. The Amended Merger Bills are not accompanied by any additional funding apart from that which was originally announced with regard to the original merger bills in 2018 and the Mid-Year Economic and Fiscal Outlook 2018-19. This flaw is in addition to those highlighted in the Association's previous submissions on the original bills.
34. Further, it is understood that much of the \$4 million has already been expended on the rules project, signage investment and other IT.
35. While any resources are welcome, an investment of \$7.7 million, including funding for a single additional Judge, is simply not sufficient to make a serious or sustained impact on the chronically resource-starved courts, whose workload and backlogs will only increase following disruption caused by the developing COVID-19 pandemic.

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019, 7-9 (Christian Porter, Attorney-General).

Answer to Question 2 on Notice

36. Senator Waters asked the Association in writing to take the following Question on Notice:

You've referred the Committee to a 2015 research project indicating that "the belief that women make false or exaggerated claims of family violence to obtain tactical advantage in family law proceedings persists among members of the legal professional and the general community despite having no foundation in research."

What do you think can be done to dispel that perception?

37. Promoting respectful, informed and inclusive discussions about the prevalence of family violence and the operation of the family law system - including the role of a specialist, stand-alone Family Court- is an important step towards dispelling such perceptions and making known the facts.
38. As noted above, the Association considers that this Committee has an important opportunity to lead meaningful consideration of the facts, research and reports by experts including the Australian Law Reform Commission, and dispel misconceptions and misunderstandings about the system while advancing proposals for meaningful, evidence-based reform.
39. Unfortunately, overcoming such perceptions is not a new challenge. Writing in 2000, former Chief Justice of the Family Court, the Hon Alastair Nicholson and Margaret Harrison noted:¹⁵

because of the nature of family law, the [Family Court] is never a popular institution. ***In Australia disaffected persons constantly attack the system on the basis of gender bias, arguing that either mothers or fathers gain an unfair advantage in parenting disputes, because judges have particular preferences which the discretionary nature of the legislation accommodates.*** Other criticisms are that the Family Court shows no understanding of the needs of children and their parents, and that the non-financial contributions of a spouse (usually, but not necessarily, a wife) are undervalued, thus perpetuating a systemic bias in the distribution of matrimonial property. Because nearly all of the Family Court's decisions are discretionary, it is not hard to produce 'evidence' (which is difficult to rebut) of alleged inconsistencies in approach. Although it is the legislation which creates the discretion, and not the Court, it is easy to criticise the Court in this regard. Specialist courts are placed in a more difficult position than generalist courts, as they are isolated from the so-called 'legal mainstream' and are thus not defended with the same vigour. When public attacks arise, there is a right and a duty for judges — and particularly a Chief Justice — to defend their court.

(citations omitted, emphasis added)

40. Chief Justice Nicholson argued "the advantages of specialist courts far outweigh the disadvantages", observing that:¹⁶

¹⁵ The Hon Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

¹⁶ 'Future directions in Family Law', Speech by the Hon Justice Alastair Nicholson, Chief Justice Family Court of Australia (10th World Conference of the International Society of Family Law, 10 July 2000) 11 <http://www.familycourt.gov.au/wps/wcm/connect/26fd8983-5af8-453e-ac7b-22b2c91b07c2/nicholson10.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-26fd8983-5af8-453e-ac7b-22b2c91b07c2-lvjPf2X>

Most of the disadvantages to which I have referred are those of perception, whether it be by Government, the media or the public. Family Courts nevertheless have to be robust and independent. Governments, the media and the public need to be reminded of their crucial role. This is not an easy road and the financial pressures employed by Governments do not make it easier. I think that we must remember what it is we are trying to do in such courts and I think that this is best summed up in the object adopted by my Court of resolving and determining family disputes and putting children and families first in that process... The Australian Family Court approach of including under the roof of the Court other relevant professionals such as psychologists, social workers and mediators is also one that is worth repeating. I also think that the Australian system of having a specialist appellate division within the Court is highly desirable.

41. When properly funded and resourced, the adversarial nature of the family law system provides for the testing of evidence, including where allegations are denied. This is why funding the system and the family law courts is so critical, even when the Budget is not in surplus. The family law system is an essential piece of social justice infrastructure and must be recognised and funded as such in times of crisis as well as prosperity.
42. The Association acknowledges the devastating personal and financial cost of the developing COVID-19 pandemic, following the bushfire crisis, for many Australians. The Association appreciates that immediate crisis management, support and the recovery effort rightly require priority funding and will place unanticipated pressure on budget forecasts.
43. Nevertheless, the Association urges the Government and Treasury not to postpone investment in the family law system, as many of the legal assistance services and justice infrastructure considered will also be impacted by, and face increased demand during and the wake of, these crises.
44. Studies have shown a significant increase in the incidence of family violence during and following crisis and post-disaster recovery. For example, one study found a 98% increase in violence against women as measured from before and after Hurricane Katrina.¹⁷
45. This will inevitably lead to needs in the family law sector and place significant pressures on already over-burdened courts and judicial officers.

¹⁷ See, eg, Schumacher, Coffey, Norris, Tracy, Clements and Galea, 'Intimate partner violence and Hurricane Katrina: Predictors and associated mental health outcomes' (2010) 25(5) *Violence Vict.* 588, 588-603, cited in R Maguire, D Bozin, G Mortimer, 'Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it', *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-thebushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

Conclusion

46. In conclusion, the Association remains committed to working with the Parliament, the Courts and all stakeholders in the family law system to promote holistic, meaningful reform to benefit children, families and survivors of family violence.
47. If the Committee would like any further information, please contact Ms Pearson at first instance on

Yours sincerely

Tim Game SC
President